No. 80-742

In the Supreme Court of the United States

October Term, 1980

NATIONAL PORK PRODUCERS COUNCIL, CHARLES GRASSLEY, THOMAS HAGEDORN, and STEVEN SYMMS,

Petitioners,

vs.

BOB BERGLAND, Secretary of Agriculture, CAROL TUCKER FOREMAN, and DONALD H. HOUSTON,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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TABLE OF CONTENTS

		PAGE
I.	Wrong Standard of Review	2
II.	Post Hoc Rationalization Cannot Justify the Rule's Unlawful Purpose	5
III.	NEPA Has Been Disregarded	6
IV.	Conclusion	7

TABLE OF CASES

Angel v. Butz, 487 F.2d 260 (10th Cir. 1973), *cert. denied,* 417 U.S. 917 (1974) 4

Burlington Truck Lines v. U. S., 571 U.S. 156 (1962) .. 4

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 2

Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218 (1943) 3

Federation of Homemakers v. Butz, 466 F.2d 462 (D.C. Cir. 1972) 3

Houston v. St. Louis Independent Packing Co., 249 U.S. 479 (1918) 3

National Nutritional Foods Ass'n. v. Weinberger, 512 F.2d 688 (2nd Cir.), *cert. denied,* 423 U.S. 827 (1975) 4

U. S. v. Nova Scotia Food Products Corp., 568 F.2d 240 (2nd Cir. 1977) 4

STATUTES

21 U.S.C. §601(n)(6) 3

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The government obscures the Rule's grave jeopardy to human health to minimize the rulemaker's lack of requisite attention to factors relevant to that jeopardy.

In truth the Rule creates a consumer trap. It permits, for example, uncured product to be formulated in lengths, shapes and colors *identical* to those of real hot dogs, to be marketed in double decker 10 packs now associated with real hot dogs, to bear "keep refrigerated" instructions now

appearing on real hot dog labels, to be packaged in wrapper colors, styles and logos currently associated with the processors of real hot dogs, to be merchandized in retail coolers adjacent to, or indeed within, stacks of real hot dogs, and to include the traditional name "hot dog" on the label. The consumer's only tip-off to this deadly trap is the presence of the term "Uncured" and the indication that the preservative nitrite is absent.

It may well be appropriate, where there is no health hazard from confusion of product identity, to indulge in a working hypothesis that ordinary consumers will read labels under ordinary circumstances. That hypothesis, however, much less the irrebutable presumption in reality urged by the government, has no place where the circumstances promoting confusion are anything but ordinary, where the ordinary consumer as well as the illiterate, the non English speaking consumer and those with impaired vision will be equally unprotected, and where the health risk from confusion could be death.

I.

Wrong Standard of Review

The government in effect claims that judicial scrutiny of the rulemaker's inattention to the label adequacy issue, Pet. 12-18—an undeniably "relevant factor" under *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971)—has been greatly limited if not completely foreclosed by a "legislative determination", Br. Op. 9, that labeling "is" an "effective means of protecting consumers." *Id.* As a consequence, argues the government, no "explicit fact-finding", Br. Op. 10, n. 6, is required on the question of the adequacy of the present label to prevent deadly botulism, and, in any event, for purposes of testing the sufficiency of the challenged rulemaking it must be

assumed, by virtue of a definition of adulteration in the Federal Meat Inspection Act, 21 U.S.C. §601(n)(6), that "the ordinary person in this country can read English or will seek the aid of someone who can, and will act upon reasonable warnings and instructions." Br. Op. 11

Applicable law permits no such approach. It is now common ground that a label cannot stand if deception, injury or confusion would be likely but for an unsupported *assumption* that consumers will read explanatory information on it. *Houston* v. *St. Louis Independent Packing Co.*, 249 U.S. 479, 487 (1918); *Federation of Homemakers* v. *Butz*, 466 F.2d 462, 465-466 (D. C. Cir. 1972); *Cf. Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, 230-231 (1943). USDA therefore like any other agency was obliged to consider the adequacy of the presently assailed label, develop an adequate administrative record supporting necessary findings on this issue, and draw conclusions rationally supported by those findings. At a minimum this would include an articulated explanation of its basis for concluding, if it so concludes, that illiterates, non-English speaking persons, consumers with impaired vision and the like[1] as well as ordinary persons unacquainted with the nitrite controversy will be adequately protected against botulism under the look and name alike circumstances created by the Rule.

Were the government correct that inadequacy of explanation is acceptable in labeling cases, *contra, Citizens to*

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[1] Section 601(n)(6) of the Federal Meat Inspection Act provides no more than that labeling mandated by the USDA shall be considered misbranded if not presented so as likely to be read and understood by ordinary individuals. It does not follow from this that Congress has authorized USDA to create circumstances which place large subclasses of the population at deadly risk of botulism merely because these consumers might not be classified as "ordinary."

Preserve Overton Park v. *Volpe, supra; National Nutritional Foods Ass'n.* v. *Weinberger,* 512 F.2d 688, 701 (2nd Cir.), *cert. denied,* 423 U.S. 827 (1975); *U. S.* v. *Nova Scotia Food Products Corp.,* 568 F.2d 240, 251 (2nd Cir. 1977), and that labels are legislatively presumed to be efficacious, USDA could, viewing the present situation in its limits, without rational basis authorize the inclusion, in a familiar appearing food, of a substance highly toxic to all but a few consumers as long as this fact were disclosed on the label. But that is exactly what the government is urging here when it insists that USDA was under no obligation to consider whether, and explicitly to state its conclusions and bases therefor that, *ordinary* American consumers, much less illiterates and other special classes mentioned in the Comments, would read and understand the label of a product which appears to be entirely familiar and hence needing no label inspection.[2] Until such an explicit statement is provided "in the [challenged] order . . . itself", *Burlington Truck Lines* v. *U. S.,* 571 U.S. 156, 169 (1962), that is "in the 'Statement of the Bases and Considerations' filed with the adopted regulations", *Angel* v. *Butz,* 487 F.2d 260, 263 (10th Cir. 1973), *cert. denied,* 417 U.S. 917 (1974), the court cannot conduct the review mandated by the Administrative Procedure Act, see *Citizens to Preserve Overton Park* v. *Volpe, supra; National Nutritional Foods Ass'n.* v. *Weinberger, supra,* and has no choice but to set the rulemaking aside.

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[2] The government's observation that "the Secretary must determine what type of labeling will be effective", Br. Op. 10, n.6, seems meaningless against the conjunctive observations that "explicit fact-finding [regarding labeling efficacy] is not required", *Id.* and that the efficacy of labeling has already been legislatively determined. Br. Op. 9. That formulation is a blueprint for arbitrary, unreviewable conduct. It permits the agency to assert without reason or analysis conclusions quite literally, as here, of life and death import which, because of their presumed propriety, escape judicial review.

The suggestion that USDA implicitly responded to the crucial labeling questions raised in the Comments by requiring the term "Uncured" in the challenged labels, Br. Op. 10, n. 6, does not rectify the shortcoming. For reasons just given, USDA's considerations must be, but are not here, sufficiently explicit to permit requisite judicial scrutiny. Of equal importance is the fact that there is no rational support in the record for a conclusion, were it stated, that inclusion of the term "uncured" would reasonably protect either the special classes referred to in the Comments or the general consuming public. Pet. 16-17.[3]

II.

Post Hos Rationalizations Cannot Justify the Rule's Unlawful Purpose

In answer to Petitioners' contention that the Rule was promulgated for an unlawful purpose, Pet. 22-23, government counsel say:

> "the Rule constitutes a measured response to the articulate desire of consumers and producers for products that they reasonably believe to be *less injurious to health* than products readily available in the market." Br. Op. 11

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[3] The government seemingly concedes the Rule's vulnerability when it acknowledges that illiterates, non-English speaking consumers and those with infirm vision will not be able to differentiate between certain label names including, for example, "hot dog" and "uncured hot dog." Br. Op. 10, n. 7. Even more pertinent is the fact that these are the very consumers who, not being able to "read" labels prescribed by the Rule, will rely on the similarity of physical characteristics, e.g., color and size, mandated by the Rule and familiar packaging wrappers and logos permitted by the Rule in reaching the mistaken conclusion that uncured products are the traditional, cured variety.

The health injury involved is, according to counsel, the supposed carcinogencity of nitrite. Br. Op. 3, 4, 5, 7, n. 5. The court of appeals put it this way:

> "[T]he agency found persuasive evidence that the *benefits of the regulation* would outweigh any potential safety problem." App. 11

The problem with these characterizations of the Rule's purpose is that neither they nor any other mention of cancer, carcinogencity of nitrites, comparative health risk, or health related benefits of nitrite-free food appear in the Rule's statement of bases and purpose, App. 83-91. They are at bottom nothing more than *post hoc* rationalizations by counsel and the court of the Rule's purpose which, under settled law cannot be considered by this Court. See Pet. 22, n. 13

III.
NEPA Has Been Disregarded

Even if, *contra*, Pet. 24-25, the Department's Final Impact Statement, App. 72-88, were thought to satisfy NEPA's requirement that the Rule's public health impact be assessed, the FIS conclusion that the Rule

> "is not expected to result in any increase of food poisoning from *Clostridium botulinum*"

because the spores producing that poison

> "do not generally grow at temperatures below 40°F", Br. Op. 15; App. 80

is arbitrary and irrational. The crucial inquiry was whether an increased incidence rate was likely should uncured products be handled as their traditional, cured counterparts now are at 70°, 80° and 90°F for prolonged periods in the home, on picnics and camping trips, and in lunch pails and school lockers. See Pet. 19. Contrary to the requirements of NEPA, the FIS never addressed that question.

IV.

Conclusion

In a real sense review and reversal by this Court is the consumer's last hope of protection from the deadly trap created by the Rule. Wherefore, Petitioners respectfully request that the writ issue.

Respectfully submitted,

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